

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

TURNBERRY PAVILION PARTNERS,  
L.P.,

Plaintiff,

v.

M.J. DEAN CONSTRUCTION, INC.,

Defendant.

Case No. 2:07-CV-01042-KJD-PAL

**ORDER**

Presently before the Court is Defendant M.J. Dean Construction, Inc.'s Motion for Summary Judgment (#22). Plaintiff filed a response in opposition (#23) to which Defendant replied (#24). Plaintiff also filed a Supplement (#27) to which Defendant replied (#28).

**I. Procedural History**

The present action is part of litigation flowing from the development and construction of One Turnberry Place, a luxury condominium highrise tower. In 1999, Defendant M.J. Dean Construction, Inc. ("Dean") entered into contracts with Plaintiff Turnberry Pavilion Partners, LLC ("Turnberry") the owner and developer of One Turnberry Place, to perform work during the construction of the tower. Specifically, Turnberry alleges that Dean was hired as the construction manager for the tower. Dean was also the subcontractor for the concrete work, the installation of the doors, and the placing

1 and reinforcement of steel and post-tension cable on the tower. The contracts contained provisions  
2 requiring Dean to indemnify and defend Turnberry.

3 On or about July 2, 2001, Turnberry was sued by Malco, Inc. ("Malco") who had been  
4 awarded the contracts for the exterior finish and insulation system, interior drywall, interior painting,  
5 site walls, and the gatehouse tower. Malco sought to foreclose on its mechanic's lien on the tower  
6 claiming that Turnberry owed Malco more than \$3,000,000.00 for materials, supplies, and  
7 merchandise. Malco also alleged breach of contract for Turnberry's failure to pay the November  
8 2000 draw, failure to pay undisputed and approved change orders, and failing to appropriately  
9 schedule the various trades' access to the towers so that Malco had timely access to the work space.  
10 Malco's primary focus was for breach of contract and foreclosure of its mechanic's lien to secure its  
11 right to payment.

12 On July 21, 2006, judgment ("the Malco Judgment") was entered for Malco in the amount of  
13 \$2,336, 297.57 plus pre-judgment interest. The court found that Malco encountered "serious  
14 problems" and suffered "unanticipated delay and expense as a result of Dean's concrete work." The  
15 court found additional wrongdoing on the part of Dean, who was not a party to the action, that caused  
16 delay, repair and overtime costs to Malco, including improper coordination of the trades, and  
17 mismanagement of the sole manlift, or construction elevator, that could access the top of the tower.  
18 The court awarded Malco \$1,389,603.20 for its lost production claim and \$175,960.00 for  
19 uncompensated overtime. On appeal the judgment was settled for \$2,153,883.71.

20 On September 17, 2004, the condominium owners at One Turnberry Place, through their  
21 condominium association, brought suit ("the One Turnberry Action") against Turnberry for  
22 construction defects. Turnberry denied the allegations and filed a third-party complaint against the  
23 subcontractors alleged to have cause the construction defects, including Malco and Dean. A  
24 substantial part of the litigation was the dispute over Dean's role on the project. Particularly,  
25 Turnberry and its experts alleged that Dean was liable as a result of Dean's alleged role as  
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1 construction manager, an allegation denied by Dean. Dean's role in scheduling trades and overseeing  
2 the work of subcontractors was also contested.

3 In 2007, the One Turnberry Action resulted in a settlement among the association, Turnberry  
4 and the subcontractors. Specifically, it was "the express intention of the settling parties in entering  
5 into [the] **Agreement** that the releases...releases [sic] and resolves all past, present, and future claims  
6 known relative to defects and deficiencies alleged in this **Litigation**." Without admitting liability or  
7 fault Turnberry and the subcontractors agreed to pay nearly \$9,000,000.00 to the association to settle  
8 its construction defect claims. Dean's portion was \$600,000.00. Turnberry paid \$2,000,000.00.

9 The Release provision of the settlement agreement read:

10 "In consideration of this **Agreement**, the **Settling Parties**...hereby mutually  
11 release and forever discharge one another as to any and all demands, liens,  
12 claims, assignments, contracts, covenants, actions, suits, causes of action,  
13 costs, expenses, attorneys fees, damages, losses, claims, controversies,  
14 judgments, orders and liabilities of whatsoever kind and nature...now known  
15 with respect to the **Claims** asserted in the **Litigation**[.]"

16 SETTLEMENT AGREEMENT AND RELEASE, Defendant's Motion for Summary Judgment, Ex.

17 4, p.4. The Settlement Agreement also defined **Claim** or **Claims** as:

18 "...any and all claims, demands, liabilities, damages, complaints, causes of  
19 action, intentional or negligent acts, intentional or negligent omissions,  
20 misrepresentations, breach of contract, breach of warranty, economic  
21 damages, non-economic damages, property damage, loss of use, attorneys  
22 fees, expert fees, repair costs, investigative costs, or damage of every kind and  
23 nature whatsoever, known, alleged or asserted in the **Litigation**[.]"

24 Id. at p.2. **Litigation** was defined as:

25 "...any and all claims asserted in the **Subject Action**, as set forth in Plaintiff's  
26 Complaint...Defendant's Third Party Complaint, all Fourth Party Complaints,  
and any and other claims as set forth in the final and supplemental reports of  
the following Plaintiff's experts: Christopher Allen, [etc.]"

Id.

On August 7, 2007, Turnberry filed the instant suit against Dean for indemnity, contribution,  
and declaratory relief. Turnberry seeks indemnity based on the Malco Judgment in which Malco was

1 found to have suffered “unanticipated delay, expense and additional costs cause [sic] by the acts and  
2 omissions of MJ Dean at Tower 1” for which Turnberry paid Malco.

3 On May 20, 2008, Dean filed the present motion for summary judgment asserting that the  
4 Settlement Agreement in the One Turnberry Action encompassed the current claims and forecloses  
5 Turnberry’s action.

## 6 II. Standard for Summary Judgment

7 Summary judgment may be granted if the pleadings, depositions, answers to interrogatories,  
8 and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any  
9 material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ.  
10 P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the  
11 initial burden of showing the absence of a genuine issue of material fact. See Celotex, 477 U.S. at  
12 323. The burden then shifts to the nonmoving party to set forth specific facts demonstrating a  
13 genuine factual issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
14 587 (1986); Fed. R. Civ. P. 56(e).

15 All justifiable inferences must be viewed in the light most favorable to the nonmoving party.  
16 See Matsushita, 475 U.S. at 587. However, the nonmoving party may not rest upon the mere  
17 allegations or denials of his or her pleadings, but he or she must produce specific facts, by affidavit or  
18 other evidentiary materials as provided by Rule 56(e), showing there is a genuine issue for trial. See  
19 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The court need only resolve factual  
20 issues of controversy in favor of the non-moving party where the facts specifically averred by that  
21 party contradict facts specifically averred by the movant. See Lujan v. Nat’l Wildlife Fed’n., 497  
22 U.S. 871, 888 (1990); see also Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F.3d 337, 345  
23 (9th Cir. 1995) (stating that conclusory or speculative testimony is insufficient to raise a genuine  
24 issue of fact to defeat summary judgment). Evidence must be concrete and cannot rely on “mere  
25 speculation, conjecture, or fantasy. O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1467 (9th  
26 Cir. 1986). “[U]ncorroborated and self-serving testimony,” without more, will not create a “genuine

1 issue” of material fact precluding summary judgment. Villiarimo v. Aloha Island Air Inc., 281 F.3d  
 2 1054, 1061 (9th Cir. 2002).

3 Summary judgment shall be entered “against a party who fails to make a showing sufficient to  
 4 establish the existence of an element essential to that party’s case, and on which that party will bear  
 5 the burden of proof at trial.” Celotex, 477 U.S. at 322. Summary judgment shall not be granted if a  
 6 reasonable jury could return a verdict for the nonmoving party. See Anderson, 477 U.S. at 248.

### 7 III. Analysis

8 “The construction and enforcement of settlement agreements are governed by principles of  
 9 local law[.]” United Comm. Ins. Serv., Inc. v. Paymaster Corp., 962 F.2d 853, 856 (9th Cir. 1992). In  
 10 Nevada, the construction and interpretation of settlement agreements is governed by principles of  
 11 contract law, because “a settlement agreement is a contract.” May v. Anderson, 119 P.3d 1254, 1257  
 12 (Nev. 2005). The language of a contract must be given its plain meaning “when the contract is clear  
 13 on its face[.]” Canfora v. Coast Hotels and Casinos, Inc., 121 P.3d 599, 603 (Nev. 2005). A clear and  
 14 unambiguous contract “cannot be distorted into meaning anything other than what is implied by the  
 15 language used[.]” Talbot v. Nev. Fire Ins. Co., 283 P. 404, 405 (Nev. 1930).

16 The Court finds the language of the contract is clear and unambiguous and clearly sets out that  
 17 the One Turnberry Action Settlement Agreement releases any right of indemnity Turnberry had from  
 18 Dean resulting from the Malco Judgment. The Agreement expressly set out that the “intention” of  
 19 the settlement was to release “all past, present, and future claims known relative to defects and  
 20 deficiencies alleged in this Litigation.” The parties expressly defined “Litigation” to include not just  
 21 the claims asserted in the original complaint, but also Turnberry’s Third Party Complaint and  
 22 Plaintiff’s expert reports.

23 Defendant’s Third Party Complaint alleged that Plaintiff’s damages were proximately caused  
 24 by Dean and the other subcontractors and sought indemnity and contribution from them. The same  
 25 negligence or other wrongs alleged by Turnberry encompass the conduct the court found had caused  
 26 Malco’s damages in the original action that Turnberry now seeks indemnity for. The causes of action

1 in Turnberry's third party complaint – as they relate to Dean – stem from Dean's work on the project  
2 under the alleged contracts: two separate AIA contracts between Turnberry and Dean and two  
3 subcontracts for two separate and distinct scopes of work.<sup>1</sup> Indemnity claims for Dean's alleged acts  
4 or omissions in execution of any contractual or equitable rights it allegedly owed Turnberry fall  
5 within the scope of claims "of every kind and nature whatsoever, known, alleged or asserted in the  
6 Litigation."

7        Additionally, it is clear that the facts supporting this "past" claim for indemnity were asserted  
8 in the Litigation, because Plaintiff's expert reports detailed the same concrete defects which the court  
9 found supported Malco's claims. The other primary focus of the One Turnberry Action, as it related  
10 to Dean, was Dean's alleged role as the "Construction Manager" on the site. Turnberry and its  
11 experts contended during the One Turnberry Action that Dean was liable for defects alleged because  
12 of Dean's role in construction scheduling and observation of construction. It is evident from the  
13 underlying record, including Dean's opposition to Malco's motion for summary judgment in the One  
14 Turnberry Action, and the expert reports and the deposition testimony outlined in Dean's present  
15 motion, that the issues that arose in the prior litigation were "known, alleged, and asserted in the  
16 Litigation[.]"

17        The Settlement Agreement arising from the One Turnberry Action clearly and unambiguously  
18 released the present claims arising from the Malco Judgment. Accordingly, the Court must grant  
19 Defendant's motion for summary judgment.

#### 20 IV. Conclusion

21        Accordingly, IT IS HEREBY ORDERED that Defendant M.J. Dean Construction, Inc.'s  
22 Motion for Summary Judgment (#22) is **GRANTED**;

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25        <sup>1</sup>See Plaintiff's Complaint (#1) at p.2, l.14-18. Through all the litigation the parties have  
26 disagreed over whether the two AIA contracts were ever fully executed, as the copies at issue in the  
One Turnberry Action are not signed by all the parties.

1 IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for Defendant  
2 and against Plaintiff.

3 DATED this 31<sup>st</sup> day of March 2009.  
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Kent J. Dawson  
United States District Judge  
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